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13-20-00280-CR
THIRTEENTH COURT OF APPEALS
CORPUS CHRISTI, TEXAS
1/29/2021 1:03 PM
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January 29, 2021

Honorable Kathy Mills
Clerk – Thirteenth Court of Appeals
901 Leopard, 10th Floor
Corpus Christi, Texas 78401

RE: *Elijah Tates v. State of Texas;*
Cause No. 13-20-00280-CR; 13th Court of Appeals;
Corpus Christi, Texas

Dear Ms. Mills:

This Reply is filed in response to the State's letter-brief submitted January 28, 2021. The State cited three cases during Oral Argument on January 27, 2021 and discussed their holdings in the letter-brief. Appellant replies as follows:

1. *Clarington v. State*, __ So.3d__, 2020 WL 7050095 Fla. (Dist. Ct. App. 2020)

The *Clarington* Court analysis recognized probation revocation proceedings are not "criminal prosecutions" and a defendant in that type of proceeding does not have a Sixth Amendment right to Confrontation. The *Clarington* Court did not reach the Sixth and Fourteenth Amendment Effective Assistance arguments raised by Appellant. Because of the nature of the proceedings, Clarington was not entitled to the "full panoply" of Constitutional rights that are afforded Appellant under the United States and Texas Constitutions and Texas statute. *See, e.g. Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756 (1973).

The *Clarington* Court first determined a probation violation hearing is not a criminal prosecution. *Id.* at *5. The Court emphasized that "[f]rom a constitutional standpoint it is clear that probation violation hearings are not 'criminal prosecutions' under the Sixth Amendment's Confrontation clause." *Id.* at *7. The Texas Court of Criminal Appeals has not addressed attachment of confrontation rights in a probation revocation hearing, though that Court has determined revocation proceedings are judicial, not administrative. *See, Ex parte Doan*, 369 S.W.3d 205 (Tex. Crim. App. 2012). Most intermediate court of appeals considering the issue have held that as a non-criminal proceeding, confrontation rights do not attach. *See, generally, Sabella v. State,* 578 S.W.3d 137, 142 (Tex. App. – Texarkana 2019, no pet.) (discussing courts of appeal treatment of confrontation rights in that setting after *Ex parte Doan*).

Unlike *Clarington*, Appellant's case is a criminal prosecution and Appellant, unlike a probation revocation defendant in Texas or Florida, is entitled to the "full panoply" of constitutional protections. This is reinforced by the statutory requirements of Article 33.03 of the Texas Code of Criminal Procedure that trial defendants be present at their criminal trials. The Florida Rules of Criminal Procedure are not statutory, and are instead promulgated by the Florida Supreme Court under their grant of judicial authority under their State Constitution. *See, In re Florida Rules of Criminal Procedure*, 196 So.2d 124 (1967).

Additionally, the Florida Supreme Court Suspension Order, AOSC20-23, referenced in *Clarington*, purports to suspend "[a]ll rules of procedure, court orders and opinions applicable to court proceedings…." *Clarington* at *3. Thus, the Florida Supreme Court temporary suspension order does not suspend legislative prerogatives such as Article 33.03.

Most significantly, *Clarington* did not reach the effective assistance of counsel issues present in Appellant's case: "To the extent Clarington alleges that the remote conduct of the proceeding violates his right to effective assistance of counsel, we conclude that such a claim is too speculative at this point to resolve by way of a preemptive petition seeking prohibition relief." *Clarington* at *10.

Regarding Appellant's effective assistance and access to counsel claims, it is noteworthy that in overruling the objections to being physically present, the trial judge in *Clarington* specifically informed the defendant that he could utilize a Zoom breakout room during the proceedings "whenever it is requested." *Id.* at *1.

In this case, measures were not taken to inform Appellant of his right to communicate with Trial Counsel during trial. The record reflects pre-trial attempts by Trial Counsel to speak to Appellant in a breakout room were unsuccessful. (5 RR 6). More critical: Appellant was never affirmatively informed by the Trial Court that he could utilize a breakout room "whenever it is requested," as in *Clarington*.

In this case, the record affirmatively demonstrates technological problems with the software for a breakout room and the difficulty of Appellant to hear the proceedings from his remote location inside the jail tank:

> THE COURT: [Trial Counsel] are you ready to proceed?
>
> TRIAL COUNSEL: Judge, I do -- we tried to talk to my client in the private room before the meeting. We weren't able to hook that up.
>
> THE COURT: Well, let's see if I can do it. Do you need to talk with him real quick?
>
> TRIAL COUNSEL: I do.
>
> THE COURT: Okay. Hold on just a second.
>
> JAILER: Your Honor, we can barely hear him.
>
> * * *
>
> THE COURT: Any preliminary matters we need to take up? We're going to try to fix this sound a little bit.

(5 RR 6-7) (emphasis added).

Finally, the concurring opinion in *Clarington* did not join in the analysis of the majority. *Id.* at 11 (Gordo, J. [concurring in the result only]). The concurrence markedly split on the merits analysis as decided by the majority, even in a probation revocation context. Justice Gordo invoked the "Suspension Cases" involving suspension of the Great Writ during the Civil War to emphasize his disagreement:

> Thus, I decline to join the majority's analysis, particularly to the extent that it negates a defendant's constitutional rights by balancing them with the competing interests of the temporary pandemic. 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Id. at *11 (citing *Ex parte Milligan*, 71 U.S. 2, 120–21, 4 Wall. 2, 18 L.Ed. 281 (1866)).

On request for stay while the defendant in *Clarington* sought review in the Florida Supreme Court, Justice Gordo dissented, and wrote:

> The majority goes further by engaging in a balancing test premised on the 'flexible nature' of due process rights, concluding that the probationer's significant interest in being physically present in the courtroom together with the other participants of the hearing is outweighed by the interest in ensuring the effective and expeditious administration of justice amid a pandemic. To this end, I find that the issue of whether a defendant's fundamental rights are mutable based on outside circumstances unrelated to the defendant (such as a temporary pandemic) poses an issue of great public importance with far-reaching consequences.

Clarington v. State, 2021 WL 115633, No. 3D20-1461 (Dist. Ct. App. January 13, 2021) (Gordo, J. dissenting) (not designated for publication).

Justice Gordo's use of *Ex parte Milligan*, even in the context of the limited constitutional rights of a defendant in a probation revocation proceeding, echoes the Texas Supreme Court's admonishment that "[t]he Constitution is not suspended

when the government declares such a disaster." *In re Abbott*, 601 S.W.3d 802 (Tex. 2020).

2. *State v. Kolaco*, No. 1910010939, 2020 WL 7334176 (Del. Super. Ct. Dec. 14, 2020) (not designated for publication)

Similar to the non-trial procedural posture in *Clarington*, *Kolaco* involved a suppression hearing and was before the appellate court on the issue of continuance. Interestingly, Kolaco won his suppression hearing, and the appellate court affirmed the trial court suppression of the administrative search at issue. *Id.* at *14-15. Not addressed in the unpublished opinion was whether the defendant was pursuing the trial court denial of the continuance. As noted in the State's letter brief, both State and defendant moved for continuance.

On the merits of the due process and confrontation issues, the court stressed the non-trial, pre-trial nature of the suppression proceeding. Important to issues raised by Appellant, the court noted, "case law is not uniform whether a defendant has a right to attend an evidentiary suppression hearing under the Federal Rule of Criminal Procedure or parallel state court rules." *Id.* at 6. However, the court analyzed the case assuming the defendant had such a right. *Id.* at *7.

On Confrontation, the court, similar to Florida revocation proceedings, held: "The Delaware Supreme Court has not expressly decided the issue. Nevertheless, its reasoning in *Franco v. State* [918 A.2d 1158 (Del. 2007)] strongly supports the conclusion that it would follow the large number of jurisdictions that find the Confrontation Clause inapplicable to pretrial hearings." *Id.* at 10.

Significantly, *Kolaco* did not address effective assistance claims related to the defendant's limitations, if any, in communicating with trial counsel during the evidentiary hearing.

3. *Commonwealth v. Masa*, 1981CR0307, 2020 WL 4743019 (Mass. Super. August 10, 2020) (not designated for publication)

Masa is not an appellate decision. It is a written trial court order. *Id.* at *1 ("The Court will overrule Defendant's written objection [ ]. Mr. Masa's objection is noted and his rights to appeal are preserved."). Like *Clarington* and *Kolaco*, but unlike Appellant's trial, the suppression proceeding was not a "criminal proceeding." Also like in *Clarington* and *Kolaco*, deprivation of the right of effective assistance because of the defendant's inability or diminished ability to communicate with their trial counsel was not addressed.

The trial court decided confrontation rights in a suppression hearing were not discussed; however, the trial court wrote, "Proximate physical presence is not the essence of confronting a witness, what matters most is the ability of a defendant to test and challenge a witness's testimony through cross examination." *Id.* at *2. This statement is contrary to the Texas Court of Criminal Appeals recent statements on physical confrontation proximity, "[t]he right to physical, face-to-face confrontation lies at the core of the Confrontation Clause, and it cannot be so readily dispensed with based on the mere inconvenience to a witness." *Haggard v. State,* 612 S.W.3d 318, 328. (Tex. Crim. App. 2020).

Although *Haggard* did not address public health issues occasioned by the pandemic, the case was published at arguably the zenith of the pandemic. *Haggard* made no mention that its analysis would be different or note that this compelling language would be more guarded in the event remote testimony would be justified by COVID-19 considerations or the SCOTX emergency orders.

Should you have any questions please do not hesitate to contact me.

Sincerely,

/s/ *Lane D. Thibodeaux*

Lane D. Thibodeaux
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LDT\hmd

cc: Ryan Calvert – Brazos County DA's Office
Elijah Tates

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